NALLAKARUPPAN SOLAIMALAI

v.

KETUA PENGARAH PENJARA, MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL APPLICATION NO: 44-85 OF 1998]
29 SEPTEMBER 1998

EVIDENCE: *Affidavit - Sealing affidavits from public - Whether affidavit evidence ought to be open to public - What must be shown for affidavit evidence to be sealed - Who has right to decide as to disposal of affidavit evidence - Effect of order to seal affidavit evidence - Applicant had publicised his application even before serving same upon respondent - Whether fair for applicant to now apply for order to seal respondents' affidavits - Whether applicant would be prejudiced if affidavits not sealed*

EVIDENCE: *Affidavit - Contents of affidavit - Whether averments within deponent's own knowledge - Failure to include sources of information - Whether amounts to hearsay - Affidavit avers fact of existence and nature of allegations - Deponent of affidavit supervised investigations into applicant - Whether deponent qualified to depose as to matters contained in affidavit - Rules of the High Court 1980, O. 41 r. 5*

EVIDENCE: *Affidavit - Contents of affidavit - Whether matters deposed to are scandalous - What amounts to scandalous matter - Averment in affidavit relevant to rebut allegations raised by other party - Whether affidavit ought to be expunged - Rules of the High Court 1980, O. 41 r. 6*

CRIMINAL PROCEDURE: *Trial - Adjournment - When should applications for adjournment be allowed - Hearing fixed upon certificate of urgency - Whether this allows hearing to be adjourned as of right - Adjournment sought to reply to affidavits - Matters deposed in affidavits within special knowledge of deponent and cannot be disposed of by other party - Whether adjournment ought to be granted*

CRIMINAL PROCEDURE: *Police investigation - Remand prisoner - Custody and removal of prisoner - Power of Director General of Prisons to order production in certain cases - Prisons Act 1995, s. 31(1)(a) - Whether Director General of Prisons must set out which power and on what ground he purports to exercise his power - Whether statement that Director General of Prisons was acting under s. 31(1)(a) sufficient - Whether time limit must be stipulated by Director General of Prisons - Whether stipulation that prisoner will be returned to original prison as soon as investigations concluded sufficient*

POLICE: *Powers - Police investigation - Remand prisoner - Custody and removal of prisoner - Power of Director General of Prisons to order production in certain cases - Prisons Act 1995, s. 31(1)(a) - Whether Director General of Prisons must set out which power and on what ground he purports to exercise his power - Whether statement that Director General of Prisons was acting under s. 31(1)(a) sufficient - Whether time limit must be stipulated by Director General of Prisons - Whether stipulation that prisoner will be returned to original prison as soon as investigations concluded sufficient*

CONSTITUTIONAL LAW: *Fundamental liberties - Rights of persons under remand for trial - Allegations of malice, abuse of process and mala fide - Onus on applicant - Whether reliance on own affidavit discharges onus - Transfer of remand prisoner further to s. 31(1)(a) Prisons Act 1995 - Whether s. 31(1)(a) Prisons Act 1995 ultra vires arts. 5 & 8 of Federal Constitution*

Pursuant to an order of the Director General of Prisons ('DGP') under s. 31(1)(a) of the Prisons Act 1995 ('the Act'), the applicant was transferred from the Sungai Buloh prison to the Bukit Aman Police Headquarters lockup on the grounds of national security. This application was filed for an order that the applicant be transferred back to the Sungai Buloh prison with immediate effect on the ground, *inter alia*, that the questioning of the applicant was not related to any issues of national security. In the course of hearing this application ('the original application'), both parties made a number of associated applications.

The applicant, *inter alia*, applied to expunge or exclude the affidavits in reply of the respondents ('the said affidavits') or certain portions thereof. In particular, the affidavit of one SAC Musa was objected to on the grounds that the statements contained therein were hearsay without any source identified contrary to O. 41 r. 5 of the Rules of the High Court 1980 ('the RHC'). It was further contended that the statements were scandalous and thus ought to be struck out under O. 41 r. 6 of the RHC. The respondents, meanwhile, submitted that the said affidavits were filed to reply to and to rebut very serious allegations raised by the applicant. It was further submitted that the said affidavits were set out to substantiate that national security issues are involved.

The applicant also applied for the said affidavits to be sealed from the public until the application to expunge or exclude has been ruled upon. As against this, the respondents contended that the said affidavits were public documents. The respondents also raised the fact that the applicant's original application was published in the newspapers even before it was served on the respondents.

Further, the applicant applied for the matter to be stood down on the ground that time was needed to file an affidavit in reply. The respondents objected since they opined that there was no need to file further affidavits.

With regards the original application, it was the applicant's case that the order of the DGP did not satisfy the requirement of procedural fairness in that there was a failure to: (i) state that he was satisfied in terms of s. 31(1)(a) of the Act; (ii) give reasons for the transfer; and (iii) set a time limit for the police to have custody of the applicant. The applicant also contended that he was subjected to oppressive treatment amounting to a breach of arts. 5 and 8 of the Federal Constitution ('the Constitution'). As a result, the applicant raised the issue of whether s. 31 of the Act was *ultra vires* arts. 5 and 8 of the Constitution. These allegations were denied by the respondents.

Held:

[1] Proceedings before a criminal court, even when it is quasi-criminal, is open to the public. The evidence of witnesses in a criminal court are routinely reported. Affidavit evidence presented as the evidence of a witness is no different from any other evidence in this respect.

[1a] Justice cannot be seen to be done if conducted under a shroud of secrecy. Therefore, the public should not be restricted from evidence produced in court proceedings unless valid and cogent reasons are advanced. The onus is on the applicant to show such valid and cogent reasons. Until an order is made to the contrary, the affidavits remain open.

[2] The court does not order the release of affidavits filed in court to the public. Evidence in favour of a party is the right of that party. It is up to that party to choose to produce it as evidence or not. It is up to that party to decide as to its disposal. In the same way, it is the right of the applicant to decide whether or not to release to the public his application and supporting affidavits.

[2a] In considering an interim application to seal affidavits from the public, the court must first consider whether or not the party making the application is prejudiced if the application is not granted, and if he is prejudiced, then to go on to consider whether in the circumstances the prejudice outweighs the general rule. It ought to be remembered that an order to seal without qualification could prevent third parties from becoming aware of the contents of the affidavits thereby depriving them of an opportunity to apply to make representations thereon.

[2b] Even if it is held that there is prejudice to the applicant in not making an interim order, the original application in this case was made public before the respondents were served with a copy thereby denying the respondents an opportunity to make a similar application to seal if they saw fit to do so. An order to seal the copies of affidavits in the hands

of the respondents militates against the applicant's own practice in this case which was to release his affidavit before it was served upon the other party. Fairness implies that the same rule be applied to both parties. In the circumstances, an interim order should not be given.

[3] The applicant's averment that no questions of national security were put to him necessitates the respondents to respond lest it would be inferred that they admit that no national security issues are involved. This is precisely what the affidavits in question were set out to do ie, to substantiate that national security issues are involved.

[3a] The fact that no national security questions were put to the applicant does not necessarily mean that there were no investigations involving national security being carried out.

[3b] The affidavit of SAC Musa clearly deposed as to the fact of the existence and nature of the allegations and that investigations were supervised by him. Thus, SAC Musa is entirely qualified to depose as to the matters contained in his affidavit.

[4] Whether or not a matter is scandalous depends upon context. Scandalous in the context of O. 41 r. 6 of the RHC does not refer to the scandalous things deposed to in the affidavit, but goes to the nature of the affidavit itself: that it is untruthful, a fabrication, an exaggeration, calculated to mislead from the relevant matters that ought to be considered.

[4a] The impugned paragraphs are in response to the applicant's allegations that no national security issues are involved in support of his argument that he was improperly held at Bukit Aman. They are relevant as tending to show why the police wanted the assistance of the applicant in respect of their investigations, that such investigations are into matters affecting national security, and substantiating the basis of the application under s. 31(1)(a) of the Act. Therefore, the impugned paragraphs are admissible responses to issues raised by the applicant.

[5] Applications for adjournments must be supported by good reasons. Counsel must advance reasons so that the court can scrutinise, consider and decide upon the reasons given. Otherwise hearings could theoretically be adjourned infinitely by an infinite number of applications, and hearings before the court can never be disposed off. A hearing fixed upon a certificate of urgency filed on behalf of the applicant does not confer upon the applicant the right to have the hearing adjourned as of right.

[5a] The matters in the affidavits in question relating to investigations involving issues of national security were matters within the special knowledge of the deponents of the affidavits and are not of a nature that could be answered and disposed of by any affidavit of the applicant. Therefore, there was no useful purpose in the filing of further affidavits by the applicant.

[6] To reject the purported exercise of the DGP's exercise of power under s. 31(1)(a) of the Act simply because he did not set out the words of the section, that he was satisfied, and in so doing set out the reasons, is a superficial exercise of technicality. The purpose of stating the reason is not for any esoteric abstract purpose but to fairly enable the subject to make out a case to answer. A statement that the DGP was acting under the section, in the particular circumstances of s. 31(1)(a) of the Act, is sufficient and not void. There being only one power and one ground in s. 31(1)(a) of the Act, it is not necessary to set out which power and on what ground the DGP purports to exercise his power. It is also clear that the DGP had applied his mind and exercised his discretion when he specified the purpose for which the applicant was transferred to Bukit Aman.

[7] The power under s. 31(1)(a) of the Act persists so long as there is an order committing the applicant to the custody of the DGP. If the remand order lapses, the authority of the order of transfer under s. 31(1)(a) of the Act *ipso facto* lapses. While the remand order to Sungai Buloh prison subsisted, and the applicant was lawfully ordered to be held under s. 31(1)(a) of the Act, setting out the duration to the effect that the applicant shall be returned to the Sungai Buloh prison as soon as investigations are concluded was sufficient.

[8] Article 5(1) of the Constitution provides a qualification "save in accordance with law". That qualification refers to 'enacted laws' and not to general concepts of law such as natural justice. There being no suggestion that s. 31(1)(a) of the Act is not a law duly enacted by Parliament, there is little basis for reference under s. 84 of the Courts of Judicature Act 1964 as to whether or not s. 31(1)(a) of the Act is *ultra vires* art. 5 of the Constitution. Thus, s. 31(1)(a) of the Act is not *ultra vires* art. 5 of the Constitution for the reason that art. 5 itself provides that the right under art. 5 could be curtailed by law.

[9] Constitutional provisions cannot be read in isolation and no fundamental right or guarantee is absolute. It is a question of striking a balance between the constitutional rights of the applicant and the duty of the police to protect the public from wrongdoers by apprehending them and

collecting whatever evidence exists against them. Each case must be decided on its own merits within the applicable constitutional principles.

[9a] Allegations of malice, abuse of process and *mala fide* are serious allegations. It strikes at the root of the public's own manifestation of authority under the constitution, charged with the duty to protect the public, to maintain law and order. It is not prudent to lightly accept allegations of oppressive conduct by authority. Indeed, s. 114(e) of the Evidence Act 1950 provides that the court may presume that judicial and official acts have been regularly performed.

[9b] To succeed upon the grounds advanced, the applicant must discharge the onus that is upon him upon a balance of probabilities that his factual allegations with regard to his treatment are true. Here, the applicant merely relied upon his own affidavit without more.

[10] Given the evidence before the court that there are allegations of a very serious nature against a third person such as to raise concerns of national security, that there are reasonable grounds to justify further and thorough investigations, and since the allegations suggest the involvement of the applicant, there are reasonable grounds for the conclusion that investigations must be continued and that the applicant be questioned.

[Application dismissed.]

Cases referred to:

Comptroller General of Inland Revenue v. NP [1973] 1 MLJ 165 ***(refd)***

Dato Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuen [1997] 1 CLJ 665 ***(cit)***

Ooi Ah Phua v. Officer-in-Charge, Criminal Investigation, Kedah/Perlis [1975] 198 ***(foll)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(cit)***

Rossage v. Rossage & Ors [1960] 1 All ER 600 ***(cit)***

Wan Othman Datuk Wan Yusof v. Kewangan Utama (M) Bhd [1993] 2 CLJ 572 ***(foll)***

Wong Kam Ming v. The Queen [1980] AC 247 ***(cit)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 25(2), 84

Criminal Procedure Code (FMS Cap 6), s. 117

Evidence Act 1950, s. 114(e)

Federal Constitution art. 5(1), (2), (3), (4), (5)

Internal Security Act 1960, s. 57(1)(b)

Prisons Act 1995, s. 31(1)(a)

Prisons and Lockup Rules, s. 103

Rules of the High Court 1980, O. 41 rr. 5(2), 6

For the appellant - Manjeet Singh Dhillon (Balwant Singh Sidhu with him); M/s Singh Sidhu & Co
For the respondents - Azahar Mohamed (Stanley C Augustine DPP with him)

Reported by S Dharmendran

JUDGMENT

Abdul Wahab Patail J:

When I delivered my decision on 4 September 1998, I had stated that I will issue the written reasons later. I do so now.

The background of this application ('the original application') is as follows.

The applicant, Nallakaruppan a/l Solaimalai, having been charged on 12 August 1998 with an offence under s. 57(1)(b) of the Internal Security Act 1960, has been remanded into custody at Sungai Buloh prison. On 13 August 1998, pursuant to an application ('exh. OM-1') of the same date, the Director General of Prisons ('the DGP') issued an order ('exh. OM-2') under s. 31(1)(a) of the Prisons Act 1995 ('the Act'), transferring the applicant to Bukit Aman Police Headquarters lockup ('Bukit Aman'), where he has been held since.

This application, supported by the affidavit of the applicant, was filed under a certificate of urgency on 25 August 1998, for the following orders ('the original application'):

(1) pemohon dipulangkan dengan segera ke Penjara Sg Buloh untuk direman di sana sehingga perintah selanjutnya oleh mahkamah yang mulia ini; and

(2) lain-lain relif atau relif yang selanjutnya seperti itu yang difikirkan sesuai oleh mahkamah yang mulia ini.

When the application came up for hearing, there were a number of associated applications.

The First Application

On 1 September 1998, being the date of hearing requested by the applicant, En Azahar for the respondents applied for a two day adjournment to file their reply. The application not being objected to, was adjourned to 3 September 1998.

The Second Application

On the morning of 3 September 1998, the respondents filed four affidavits in reply. Mr Manjeet Singh for the applicant, applied to the court for adjournment to the afternoon on the basis that the affidavits that were served on the applicant at 8.25am, required careful study and attention, and there may be the need to cross-examine all four deponents for the respondents.

The request for adjournment to the afternoon was granted without objection.

The Third Application

Mr Manjeet Singh, on the ground that at first glance, the affidavits seem to contain material that has no place before the court, contended that they may have to be expunged or excluded; also that since the material seemed scandalous, he applied for the affidavits to be sealed from the public until the same has been ruled upon in the afternoon.

En Azahar objected, submitting that the affidavits filed that morning are public documents and has been filed to reply to and to rebut very serious allegations by the applicant. He added that although the applicant's application was published in the newspapers on 26 August 1998, the respondents were served with the application only at 3.55pm on 26 August 1998. He submitted the relevant articles from *'The Star', 'Utusan Malaysia' 'The Sun',* and *'The New Straits Times'* of that date.

To this, Mr Manjeet Singh replied that the affidavits went well beyond the relevant, extending to personalities who were not in court to defend themselves when in fact, the court is concerned with the applicant.

The original application is by way of a notice of motion and heard in open court. The proceedings before a criminal court, even when it is quasi-criminal, is open to the public. The evidence of witnesses in a criminal court are routinely reported. Affidavit evidence presented as the evidence of a witness, is no different from any other evidence in this respect. It is a fundamental truth that justice cannot be seen to be done if conducted under a shroud of secrecy. Therefore, the public should not be restricted from evidence produced in court proceedings unless valid and cogent reasons are advanced. The onus is on the applicant to show such valid and cogent reasons. Until an order is made to the contrary, the affidavits remain open.

Lest it be overlooked, the court does not order, and is not ordering, the release of the affidavits filed in court to the public. The concern of the applicant, as I understand it, although the point is not made clear in submission, must be that the respondents should not release copies of the affidavits filed in court to the public.

It is necessary to pause and consider the case of such affidavits in the hands of a party. It ought to be remembered, evidence in favour of a party is the right of that party. It is up to that party to choose to produce it as evidence or not. It is up to that party to decide as to its disposal. In the same way, it is the right of the applicant to decide whether or not to release to the public his application and supporting affidavits. In this case, it would seem that the applicant had done so upon filing of the original application and before service upon the respondents. The copies of various newspaper reports published on 26 August 1998 produced by En Azahar were not denied, contested or objected to by Mr Manjeet Singh. Accepting the copies of newspaper reports as correct, references therein made it obvious that the reports were written with references to the contents of the application and affidavits. The articles in *The Star* and *The Sun* contained as follows:

> [*The Star* 26 August 1998]
> Nalla claims his remand at Bukit Aman unlawful
> By Dalilah Ibrahim
>
> KUALA LUMPUR: Magnum Corp Bhd public affairs director Datuk S Nallakaruppan, who is now being remanded at Bukit Aman, filed an application in the High Court yesterday to be transferred to the Sungai Buloh prison.
>
> In his affidavit, Nallakaruppan said his move to Bukit Aman was unlawful and that the interrogation he was put under had nothing to do with national security.
>
> On 17 August 1998, Nallakaruppan was transferred there on the order of the Director General of Prison that he be detained at the lock-up for security reasons.
>
> He had earlier been held at the Sungai Buloh prison after being charged on 12 August 1998 with unlawful possession of ammunition under the Internal Security Act 1960.
>
> In the affidavit, he said the ammunition removed by the police from his house was for a Walther pistol which was licensed to his employer, the Chief Executive of Multi Purpose Holdings Bhd, Datuk Lim Thian Kiat.
>
> (Magnum Bhd is an associate company of Multi Purpose Bhd.)
>
> He said he had a permit for the bullets and a 'carry and use' permit for the pistol but as the pistol was prone to jamming, Lim had written to the police requesting to change the pistol and subsequently Lim would collect and dispose the bullets.
>
> Nallakaruppan said none of the questions asked by police while he was detained had pertained to national security or to the charge he is facing.

The affidavit further claimed that he was subjected to threats and ill treatment by the police while at Bukit Aman.

[The Sun 26 August 1998]

Nalla files affidavit for transfer

By Arfa'eza A Aziz

...

In his 13-page affidavit supporting his application, Nalla said other than a statement recorded from him on 12 August 1998, there was nothing relating to national security or the Internal Security Act 1960 ('the ISA') that warranted his detention at Bukit Aman.

'I believe that the conduct of the police investigation in this case smacks of malice and abuse of process and is *mala fides*', he said.

On 13 August 1998, Nalla claimed trial to possessing 125 rounds ...

On 19 August 1998, High Court judge ... rejected his application to be detained at Sungai Buloh.

The court was told his detention at Bukit Aman was to allow police investigations can be carried out involving the security of the nation.

He was ordered to be presented before a magistrate's court on a weekly basis.

In his affidavit. Nalla said '...'

Now, in considering this application in such circumstances for an interim order, the court must first consider whether or not the party making the application is prejudiced if the application is not granted, and if he is prejudiced, then to go on to consider whether in the circumstances the prejudice outweighs the general rule. It ought to be remembered that an order to seal without qualification, as applied for by Mr Manjeet Singh, could prevent third parties who might be prejudiced from becoming aware of the contents of the affidavits and thus deprived from an opportunity to apply to make representations thereon.

Even if it is held that there is prejudice to the applicant in not making an interim order, the application by notice of motion was made public even before the court was able to fix a date to hear it, and before the respondents were served with a copy, and thus denying the respondents an opportunity to make a similar application if it saw fit to do so; this is a compelling reason why in the circumstances, an interim order should not be given. Having taken his matter, figuratively, to the street, it is a little late in the day to seek shelter from it without giving more reason to seal all affidavits in reply than that counsel would submit on the affidavits in the afternoon.

The application by Mr Manjeet Singh is very general in nature, covering all four affidavits, when it is clear, even on a quick perusal, that the affidavits of ACP Ramasamy and Datuk Haji Omar (Director General of Prisons) relate directly to the applicant's transfer and denials of allegations made, and not matters for which, to use Mr Manjeet Singh's words, 'an embargo to keep within the court's precincts' could be arguably justified. The affidavit of the Attorney General, which relates to the legal aspects involved, cannot possibly be something that could require being kept under wraps. The affidavit of SAC Musa appears also to answer allegations made, and to the effect that the applicant was held in relation to his role in a series of investigations involving a third party.

The court, having read the affidavits of both the applicant and the respondents, cannot see any prejudice occasioned to the applicant *per se*, by not making an interim order to seal the affidavits. The court is confident that news editors, aware that an application to expunge or exclude certain affidavits or parts thereof would be entertained and may be granted in the afternoon, would exercise due caution before publishing.

To summarise, this present application is for an order for 'an embargo to keep within the court's precincts' the affidavits filed by the respondents. If the order is in respect only of the affidavits filed in court, it is of little purpose. If the order is to cover the copies of affidavits in the hands of the respondents, such an order militates against the applicant's own practice, in this case, which was to release his affidavit before the hearing or it would appear before it was served upon the other party. Fairness implies that the same rule be applied to both parties. Given the interest generated by the public release of the applicant's affidavit, there is much less mischief in not preventing the release of the affidavits rather than by preventing, as it would end speculation as to its contents. The application in the afternoon to exclude or expunge all or parts of the affidavits from the court's records and consideration, is a normal process in the courts and it will not be prejudiced by the refusal of the present application. If in such hearing a case is made out for an order that the parts expunged or excluded should be barred from publication, an order could be made then. Indeed it must be said that much less mischief will be occasioned if the public knows what is being expunged or excluded from consideration by the court. There is perhaps a price for transparency, but that price is a bargain compared to justice in the proverbial byzantine secrecy.

Counsel not having shown grounds of sufficient substance for such an interim order covering all four affidavits, the court has no proper basis to grant the application and must reject the application.

The Fourth Application

In the afternoon, Mr Manjeet Singh commenced upon his submissions. This fourth application is to expunge or exclude the affidavits or certain portions thereof, filed on behalf of the respondents.

The substance of his argument is as follows: The applicant, under remand in Sungai Buloh prison pending trial had been transferred to Bukit Aman, where he has been held for 35 days. His application is to be transferred back to Sungai Buloh prison. To support his application, his affidavit sets out at length that he was subjected to a form of intensive interrogation by teams of interrogators in turns, and he was questioned not about matters involving national security but about his family and business. It was submitted that in reply, the respondents could either agree or disagree, and all that is relevant is what happened to the applicant in Bukit Aman and what the interrogation was about. It was argued then that the affidavit of:

(1) The Attorney General, Tan Sri Dato Mohtar bin Abdullah could not give evidence as to the manner, style or details of interrogation and his affidavit was not worth the paper it was printed on; that the affidavit dealt with justifications for national security which is not in issue in the application. But apart from that and the fact that he may intend to cross examine the Attorney General, he had no objection.

(2) The Assistant Commissioner of Police, Ramasamy a/l Veerapan was mere denial, but otherwise not the subject of this objection.

(3) Director General of Prisons, Datuk Haji Omar bin Mohamed Dan ('DGP'), was similarly not objected to but would be debated upon in relation to s. 31(1)(a) of the Prisons Act 1995.

(4) Senior Assistant Commissioner of Police, Musa bin Hj Hassan, particularly paras 9, 10, 11, 12 and 13 thereof, is hearsay and irrelevant, in breach of O. 41 of the Rules of the High Court 1980 ('the RHC').

A word of caution. The court is only concerned to hear at this stage any objections as to any or all or parts of the affidavits. If there are no objections, gratuitous and unnecessary comments are best avoided. While to serve the interests of justice court hearings are public in nature, that same interest is best aided if submissions are confined to the relevant issues and not mixed with rhetoric more suitable for consumption of other audiences.

There being no substantial objection to the first three affidavits, I turn to paragraphs objected to in the affidavit of SAC Musa. I reproduce herewith the paragraphs:

9. Di dalam menjalankan siasatan kes ini, selain memperolehi keterangan-keterangan saksi-saksi, keterangan-keterangan dokumentar, keterangan-keterangan menyokong (corroborative) dan keterangan-keterangan forensik, di antara lain, seramai tujuh orang saksi telah memberi pernyataan (bertulis) kepada polis seperti berikut:

9.1 Seorang saksi lelaki telah menyatakan bahawa dia telah diliwat oleh Dato' Seri Anwar sebanyak 15 kali. Kegiatan homoseksual ini telah dilakukan di beberapa tempat termasuk di sebuah apartmen, Tivoli Villa di Bangsar. Apartmen ini dimiliki oleh sebuah syarikat yang mana Nallakaruppan adalah salah seorang pengarahnya yang mempunyai akses ke atas apartmen tersebut.

9.2 Seorang saksi telah memberi kenyataan bahawa dia mengesyaki kakak iparnya menjalinkan hubungan seks dengan Dato' Seri Anwar dan perbuatan tersebut dilakukan di apartmen Tivoli Villa.

9.3 Bekas pemandu peribadi Nallakaruppan dalam kenyataannya menyatakan bahawa dia pernah membawa Dato' Seri Anwar bersama Nallakaruppan pergi ke tempat tertentu untuk perkhidmatan seks haram. Dia pernah ditugaskan oleh Nallakaruppan untuk pergi mengambil perempuan-perempuan berbangsa Cina, Mexican, Eurasian dan lain-lain bangsa untuk kegiatan seks haram. Pernah pada satu ketika, selepas balik dari apartmen Tivoli Villa, saksi ini memandu kereta yang dinaiki oleh Dato' Seri Anwar bersama Nallakaruppan dan seorang wanita yang mana Dato' Seri Anwar dilihat memakai rambut palsu.

9.4 Seorang saksi yang terlibat dalam pembekalan perempuan-perempuan bagi maksud pelacuran menyatakan bahawa Nallakaruppan pernah menghubunginya untuk mendapatkan khidmat seks haram. Saksi ini menyatakan dia juga beberapa kali telah membekalkan kepada Nallakaruppan perempuan-perempuan tersebut.

9.5 Seorang saksi wanita menyatakan bahawa Nallakaruppan telah memperkenalkannya kepada Dato' Seri Anwar semasa di dalam kereta. Kemudiannya mereka bertiga telah pergi ke apartmen Tivoli Villa. Di sebuah bilik di dalam apartmen tersebut, saksi ini menyatakan dia telah dicabul kehormatannya dan dia juga menyatakan bahawa Dato' Seri Anwar telah merayu-rayu kepadanya untuk mengadakan hubungan seks tetapi dia telah menolaknya. Sewaktu kejadian ini berlaku, Nallakaruppan berada di apartmen tersebut.

9.6 Seorang lagi saksi wanita menyatakan bahawa dia pernah dibawa oleh Nallakaruppan ke sebuah banglo dan diperkenalkan kepada Dato' Seri Anwar. Saksi ini menyatakan dia diminta masuk ke sebuah bilik dan kemudiannya Dato' Seri Anwar telah masuk ke bilik tersebut lalu mencium dan menghempapnya sambil memeluknya. Namun dia tidak menyerahkan dirinya untuk hubungan seks. Untuk mengelakkan dirinya daripada keadaan tersebut, dia telah membuat helah yang dia di dalam keadaan haid.

9.7 Seorang lagi saksi wanita yang bekerja di sebuah syarikat yang mana Nallakaruppan adalah salah seorang pengarah syarikat tersebut, menyatakan bahawa dia pernah dibawa oleh Nallakaruppan ke apartmen Tivoli Villa dengan kereta yang dipandu sendiri oleh Nallakaruppan. Di apartmen tersebut, dia telah terperanjat apabila ditemukan dengan Dato' Seri Anwar Ibrahim. Mereka telah mengadakan hubungan seks. Setelah selesai mengadakan hubungan seks dengan Dato' Seri Anwar, saksi ini menyatakan bahawa mereka telah berbincang tentang hal ehwal politik negara. Nallakaruppan telah memberi saksi ini RM350.

9.8 Pihak polis juga mempunyai keterangan bahawa Nallakaruppan ada memberi wang tunai berjumlah RM60 juta kepada Dato' Seri Anwar semasa pilihanraya umum tahun 1995.

9.9 Terdapat juga keterangan yang menunjukkan Nallakaruppan telah mengalihkan aktiviti-aktivitinya ke sebuah apartmen di Impiana Court Ampang, Selangor selepas siasatan pertama yang dijalankan berkaitan surat layang terhadap Skandal Seks Dato' Seri Anwar Ibrahim pada Ogos 1997. Apartmen ini dimiliki oleh sebuah syarikat yang disenaraikan di Papan Pertama Bursa Saham Kuala Lumpur di mana dia merupakan seorang pengarahnya. Kegiatan-kegiatan seks haram ini masih berterusan walaupun siasatan polis telah dimulakan.

10. Sewaktu pihak polis menjalankan siasatan, satu lagi laporan polis telah dibuat oleh seorang ahli koporat yang mendakwa bahawa Dato' Seri Anwar cuba memikat isterinya ketika beliau dan isterinya mengikuti rombongan Dato' Seri Anwar ke Washington. Dalam siasatan yang dijalankan oleh pihak polis, adalah terbukti Nallakaruppan telah juga terlibat dalam aduan yang dibuat oleh ahli koporat tersebut.

11. Pihak polis juga mempunyai maklumat bahawa Nallakarupan sering mengikuti Dato' Seri Anwar ke luar negara dan menjalankan aktiviti-aktiviti sebagai orang tengah di mana membolehkan Dato' Seri Anwar dipergunakan oleh anasir-anasir jahat luar negara yang boleh mengancam keselamatan dan kesejahteraan Negara.

12. Pada 31 Julai 1998 jam 4.30 petang saya telah pergi ke rumah Nallakaruppan untuk membuat pemeriksaan kerana keterangan menunjukkan bahawa dia adalah terlibat dengan siasatan kes '50 Dalil Mengapa Anwar Tidak Boleh Jadi PM'. Saya telah menjumpai di antara lain barang-barang bukti seperti berikut:

12.1 125 butir peluru jenis Fiocchi 6.35mm.
12.2 150 butir peluru .38 special.
12.3 96 butir peluru 12 bore.
12.4 sepucuk pistol .38 Smith & Wesson.

12.5 (a) Surat-surat asal peribadi kepada Dato' Seri Anwar Ibrahim seperti berikut:

(i) surat asal daripada syarikat awam yang disenaraikan di papan pertama Bursa Saham Kuala Lumpur;

(ii) surat asal daripada sebuah syarikat awam memohon untuk membeli saham yang disenaraikan di papan pertama Bursa Saham Kuala Lumpur;

(iii) Surat asal peribadi yang ditulis tangan oleh seorang Hakim Mahkamah Tinggi kepada Dato' Seri Anwar Ibrahim

(iv) lima surat-surat asal daripada syarikat awam yang disenaraikan di papan pertama Bursa Saham Kuala Lumpur, yang di alamatkan kepada Kementerian Kewangan memohon projek-projek Kerajaan; dan

(v) surat terkelas daripada Pegawai Kementerian Kewangan kepada Dato' Seri Anwar Ibrahim.

12.6 Wang tunai bercampur-campur yang dijumpai dalam mata wang Pound Sterling, US Dollar, Singapore Dollar dan Ringgit Malaysia berjumlah lebih kurang RM2juta

13 Saya ingin menegaskan bahawa kes ini boleh menggugat keselamatan negara sekiranya tidak disiasat dengan teliti dan menyeluruh serta tanpa 'fear or favour' di atas sebab-sebab berikut:

13.1 pemohon dipercayai mempunyai maklumat yang melibatkan seorang pemimpin tertinggi negara iaitu Dato' Seri Anwar Ibrahim;

13.2 berdasarkan bahawa pemohon sering menuruti sama Dato' Seri Anwar dalam menjalankan tugas-tugasnya di luar negara adalah dikhuatiri bahawa kegiatannya boleh dieksplositasikan oleh anasir-anasir jahat di dalam dan di luar negara yang ingin menjejaskan keselamatan negara;

13.3 kegiatan-kegiatan pemohon dengan Dato' Seri Anwar Ibrahim boleh mendedahkan pemimpin negara tersebut diperas ugut bagi kepentingan anasir-anasir jahat di dalam dan di luar negara yang akan memudaratkan keselamatan negara;

13.4 sepanjang penyiasatan kes ini terdapat beberapa saksi telah diugut oleh orang-orang tertentu manakala seorang saksi lain telah diancam nyawanya; dan

13.5 pemohon dipercayai mempunyai akses kepada rahsia negara melalui Dato' Seri Anwar dan memungkinkan dia membocorkan rahsia negara.

Mr Manjeet Singh submitted that these statements are hearsay without any source identified. It was submitted that pursuant to O. 41 r. 5 of the RHC, only such evidence as is directly known by the deponent may be given by the deponent of an affidavit; and even if the affidavit of SAC Musa is accepted as of the class excepted under O. 41 r. 5(2) of the RHC, he must give the sources and grounds thereof. It was argued that the paragraphs are scandalous and may be struck out under O. 41 r. 6 of the RHC which empowers a court to strike out an affidavit which is scandalous, irrelevant or otherwise oppressive. Mr Manjeet Singh cited *Rossage v. Rossage & Ors* [1960] 1 All ER 600, where since the proportion of irrelevant material is so high, the affidavit should be removed from the file.

The applicant had in fact averred in his affidavit that no questions of national security was put to him in the period he is confined in Bukit Aman. This averment contradicted the ground stated in exhs. OM-1 and OM2, the application and the transfer order under s. 31(1)(a) of the Act. In my view, it became necessary then for the respondents to respond to that averment, since if they should fail to do so, it would be inferred that they admit that they have no national security reasons to do so as alleged. Upon careful consideration of the argument that no national security question was put to the applicant, I cannot agree that that necessarily means that there were no investigations involving national security being carried out.

The affidavits of the Attorney General and particularly of SAC Musa has set out to substantiate that national security issues are involved. The affidavit of SAC Musa read as a whole, shows he was clearly a person who knows and is able to depose as to the matters in the affidavit he is in charge of investigations, and the investigations are into allegations of scandalous conduct by a third party whose position in the government was such that national security questions were raised. In those allegations, the applicant appear to be a person in the picture.

The affidavit of SAC Musa clearly deposed as to the fact of the existence and nature of the allegations, and that investigations were supervised by him. I do not find it strange that he makes no opinion as to the truthfulness of the allegations and witnesses. If he did, he would have become, arguably, unsuitable to conduct a professional, meticulous and impartial investigation.

Encik Azahar for the respondents is, in my view, entirely right in submitting that evaluation by SAC Musa of evidence gathered in the course of investigation may only be made at the end of the investigations, and SAC Musa cannot be expected to disclose the identities of witnesses.

SAC Musa is, in my view, entirely qualified to depose as to the matters contained in his affidavit, and in the form that he has done so.

The next objection is that the matters he has deposed to are scandalous and on this other ground ought to be expunged. Whether or not a matter is scandalous depends upon context. Evidence of rape is relevant in a trial where a person is charged with rape. Rape by any measure is a scandalous act. Yet the evidence, trial proceedings or record cannot be said to be scandalous when such evidence is heard. Thus it was held in *Wan Othman bin Datuk Wan Yusof v. Kewangan Utama (M) Bhd* [1993] 2 CLJ 572 that evidence, even if scandalous, is admissible if relevant. Scandalous in the context of O. 41 r. 6 of the RHC does not refer to the scandalous things deposed to in the affidavit, but goes to the nature of the affidavit itself: that it is untruthful, a fabrication, an exaggeration, calculated to mislead from the relevant matters that ought to be considered.

Mr Manjeet Singh's reply did little to assist the court:

> We are not challenging [the] decision to charge him under the ISA, etc.
>
> We are not stating here they cannot investigate, and [they] may carry on for the next ten years.
>
> We say, security or otherwise, unless [the] RHC says so, we have to comply – [and the] affidavit does not comply with O. 41.
>
> They cannot hide behind Musa – he is not the interrogator. There are 40-50 officers who were interrogating. Where are their affidavits?
>
> The point is they have not satisfied O. 41. [ACP] Musa is not directly involved. He cannot say if there was or was not oppression.
>
> *Wan Othman's* case relied on a case upon which *Rossage* was based. *Wan Othman's* case applies only if the [ACP] Musa affidavit complies with O. 41.
>
> The core [of the matter] is satisfaction of O. 41. [The] court cannot abdicate the duty to protect the applicant from the police. A blue uniform does not give [ACP] Musa [the right] to ignore the applicant's rights.

I accept the respondent's submission that the impugned paragraphs are in response to the applicant's allegations that no national security issues are involved in support of the argument he was therefore improperly held at Bukit Aman. The affidavits were clear that the national security aspects arise not from the applicant himself but because of the involvement of the third party. I find therefore that the impugned paragraphs are relevant as tending to show why the police wanted the assistance of the applicant in respect of their investigations, that such investigations are into matters affecting national security, and substantiating the basis of the application under s. 31(1)(a) of the Act; and therefore are admissible responses to issues raised by the applicant.

I note that the hearing of this application was adjourned from approximately 10am to the afternoon. No one appeared on behalf of the third party, who is more directly impugned, to make any similar application, where the right of such third party to make such application could be submitted upon and considered.

The application to expunge or strike out the affidavit of SAC Musa or alternatively, paras 9, 10, 11, 12 and 13 was therefore rejected and the four affidavits filed by the respondents were accepted into the record.

The Fifth Application

Next, Mr Manjeet Singh informed the court that he will need a further date to file an affidavit in reply and asked for the matter to be stood down for six to seven days. This was objected to by En Azahar on the grounds that the question is a simple one: whether the detention of the applicant in Bukit Aman was necessary? Mr Manjeet Singh replied that the affidavits that need to be filed are an affidavit in reply by the applicant, affidavits by the parties named stating that there are issues to be replied to and explained, and the investigation may go on in the meantime.

Whether the respondents have to file further affidavits is a matter for the respondents to decide. Encik Azahar objected to further postponement, and does not feel the need to file further affidavits. The issue then is whether there is the need for the applicant to file an affidavit in reply. Now Mr Manjeet Singh did not explain to the court what he sought to reply to in the affidavit in reply. Neither did he explain why he needed six to seven days.

Applications for adjournments must be supported by good reasons. Counsel must advance reasons so that the court could scrutinise, consider and decide upon the reasons given. Otherwise hearings could theoretically be adjourned infinitely by an infinite number of mere applications, and hearings before the court can never be disposed off. That this hearing was fixed upon the certificate of urgency filed on behalf of the applicant does not confer upon the applicant the right to have the hearing adjourned as of right.

The four affidavits for the respondents had denied the applicant's allegations, and the matter could be decided upon after hearing submissions as to the relative merits. The matters in the affidavit of the Attorney General and of SAC Musa relating to investigations involving issues of national security were matters within the special knowledge of the deponents of the affidavits, and are not of a nature that could be answered and disposed of by any affidavit of the applicant. Further postponements for parties to file similar affidavits to reiterate their allegations serves no purpose.

From the picture that emerges from the affidavits filed, there is no suggestion that there are persons who could corroborate the allegations in the affidavit of the applicant with regard to his being held at Bukit Aman.

In the event and having considered these questions, I find that no useful purpose would be served by the filing of further affidavits. The application for adjournment was therefore refused.

The Original Application

At that point, Mr Manjeet Singh informed the court that he did not have his authorities with him and was not ready. He apologised. Encik Azahar was ready. Mr Manjeet Singh suggested submissions could be continued the next morning and informed the court that he would need two hours. Mr Balwant Singh, assisting Mr Manjeet Singh came forward to his aid.

Mr Balwant Singh, relying on s. 25(2) of the Court of Judicature Act 1964, *Hong Leong Equipment Sdn Bhd v. Liew Fook Chue*n [1997] 1 CLJ 665; [1996] 1 MLJ 481 and *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, as basis of the powers of the court, took issue with the action of the DGP under s. 31(1)(a) of the Act. It was argued that the order of the DGP did not satisfy the requirement of procedural fairness in falling to state that he was satisfied in terms of s. 31(1)(a) of the Act, failing to give reasons and failing to set out a time limit for the police to have custody of the applicant.

Paragraphs 2.1.5 and 2.3 of the application by the police ('OM-1') sets out the reasons for their application:

> 2.1.5 Surat-surat yang dialamatkan kepada Menteri Kewangan:
>
> (a) surat-surat asal peribadi kepada Dato' Seri Anwar Ibrahim:
>
> (i) surat asal daripada syarikat awam yang di senaraikan di papan pertama Bursa Saham Kuala Lumpur;
>
> (ii) surat asal daripada syarikat awam memohon membeli saham yang disenaraikan di papan pertama Bursa Saham Kuala Lumpur;
>
> (iii) surat asal peribadi yang ditulis tangan oleh seorang Hakim Mahkamah Tinggi kepada Dato' Seri Anwar Ibrahim;
>
> (iv) lima surat asal daripada syarikat awam yang disenaraikan di papan pertama Bursa Saham Kuala Lumpur, dihantar kepada Kementerian Kewangan memohon projek-projek Kerajaan; dan
>
> (v) surat terkelas daripada Pegawai Kementerian Kewangan kepada Dato' Seri Anwar Ibrahim.

2.3 Sebab-sebab keselamatan Negara seperti berikut:

(a) siasatan melibatkan seorang pemimpin negara iaitu Dato' Seri Anwar Ibrahim dan lain-lain pemimpin negara lagi;

(b) OKT dipercayai mempunyai maklumat yang mana boleh mendedahkan perbuatan peras ugut terhadap pemimpin negara tersebut bagi kepentingan dirinya atau mana-mana pihak. Oleh yang demikian rahsia negara mungkin terjejas; dan

(c) untuk keselamatan diri OKT di mana terdapat beberapa saksi di dalam kes ini telah diugut.

Examining the order exhibited as exh. OM-2, it is clear the DGP had in mind s. 31(1)(a) of the Act and that he exercised his power under it. The power in s. 31(1)(a) of the Act is specific. It is as follows:

(1) The Director General:

(a) may, being satisfied that there are reasonable grounds requiring the presence of a prisoner at any place in Malaysia; or

(b) shall, where the presence of a prisoner is required for the purpose of any public inquiry,

by order in writing direct that the prisoner be taken to that place.

(2) A prisoner taken from a prison under subsection (1) shall, whilst outside that prison, be kept in such custody as the Director General may, by order in writing, direct, and whilst in that custody shall be deemed to be in lawful custody.

There is clearly only one power, and one ground under s. 31(1)(a). To reject the purported exercise of his power under s. 31(1)(a) simply because he did not set out the words of the section, that he was satisfied, and in so doing set out the reasons, is a superficial exercise of technicality. Excess of such technicality instead of taking a balanced and fair view is more likely to bring the practice of law into ridicule. I find that in view of the fact s. 31(1)(a) relates to only one alternative, the failure to reproduce the exact words in his order is immaterial and has not caused any injustice. The purpose of stating the reason is not for any esoteric abstract purpose but to fairly enable the subject to make out a case to answer. Section 31(1)(a) contains only one sole ground. I find that a statement that the DGP was acting under the section, in the particular circumstances of s. 31(1)(a) is sufficient and not void. There being only one power and one ground in s. 31(1)(a), it is not necessary to set out which power and on what ground the DGP purports to exercise his power. It is also clear that the DGP had applied his mind and exercised his discretion when he specified the purpose for which the applicant was transferred to Bukit Aman.

Next is the objection that there was no time limit in the DGP's order. Encik Azahar had argued in reply that, 'Banduan tersebut seterusnya, hendaklah dibawa balik semula ke penjara Sungai Buloh sebaik sahaja selesai siasatan yang dijalankan ...' is a time limit. Perhaps it is a time limit, but only of sorts. But I would agree it cannot be said that the DGP has abandoned the applicant totally to Bukit Aman. The power under s. 31(1)(a) persists so long as there is an order committing the applicant to the custody of the DGP. If the remand order lapses, the authority of the order of transfer under s. 31(1)(a) *ipso facto* lapses. While the remand order to Sungai Buloh Prison subsists, and the applicant is lawfully ordered to be held in Sungai Buloh Prison under s. 31(1)(a), setting out the duration as quoted above, in my view is sufficient. It is impossible to say how soon or how long it would take to complete investigations. Given the nature and number of allegations being investigated, it is clear that a period longer than normal for the usual run of the mill cases is needed. Given that the investigations would determine the truth or falsity of the allegations involving the former Deputy Prime Minister and of the applicant, if any, an extensive and thorough investigation is justified.

It was submitted that the applicant was held for 34 to 35 days at Bukit Aman. I find this is not entirely correct. The s. 31(1)(a) of the Act order was issued on 13 August 1998, and I recall complaint by Mr Manjeet Singh that the applicant was removed only on 17 August 1998, prompting the allegation that the removal was to deny counsel from seeing the applicant. Counting from that date to the hearing date, the period during which the applicant was held at Bukit Aman pursuant to the s. 31(1)(a) of the Act order until the hearing works out to be about 18 days.

Given that a thorough and extensive investigation is involved, and it is impossible to predict how long the police investigation would require the applicant, I cannot say that 18 days was unduly long in the circumstances, particularly when his remand *per se* is not at issue since he is remanded pending trial, and the real objection is that the applicant does not agree with the DGP's decision that the applicant's presence was required at Bukit Aman.

Further, the question is essentially moot since the court had ordered, with the agreement of the parties, on 19 August 1998, that the applicant is to be produced weekly before a magistrate. Questions as to the continued holding of the applicant at Bukit Aman may be raised at such appearances.

Mr Manjeet Singh continued after Mr Balwant Singh completed his submissions the next day. Submitting that the court has power to safeguard the rights of parties before it as provided for by the constitution and the laws, he argued that the manner and conduct of the transfer to and holding of the applicant at Bukit Aman had breached the fundamental rights of the applicant.

He submitted that although Malaysian law does not provide specifically as to the rights of persons under remand for trial, their rights are comparable to those persons under s. 117 Criminal Procedure Code (FMS Cap 6) remands.

Mr Manjeet Singh referred to *Dato Mokhtar Hashim & Anor v. PP* [1983] 2 MLJ 232 at p. 273, submitting that the laws of Malaysia does not permit interrogation or subjecting an under-remand prisoner to treatment that is oppressive.

It was submitted that the applicant was subjected to continuous interrogation by teams of interrogators for 34 days, questioned while he has meals with subtle threats, exposed to cigarette smoke, placed in solitary confinement with no one to speak to except for two short visits by his wife, unable to switch off lights when sleeping; that in that time, there were no questions relating to national security posed to the applicant. It was argued there was no reply to these allegations and that therefore the respondents must stand condemned. Mr Manjeet Singh implied that there was no national security issues involved because the police apparently sat on the order for transfer for four days before actually taking the applicant to Bukit Aman on 17 August 1998, the day counsel was to see the applicant in Sungai Buloh. It was submitted that the respondents admit to the allegation at para. 21 that the applicant was allowed to rest on 25 August 1998 so that the lawyers could not see him in an exhausted state. It was also submitted that the applicant is entitled to protection as contained in s. 103 of the Prisons and Lockup Rules. Mr Manjeet Singh completed his submission with the suggestion that the court considers putting under s. 84 of the Courts of Judicature Act 1964 the question that:

> With regard to s. 31 of the Prisons Act 1995 and issues to be raised in this case, whether or not there has been a violation or breach of arts 5 and 8 of the Federal Constitution and whether s. 31 is *ultra vires* art 5.

The first part of the above involves 'issues to be raised'. It would be ludicrous to frame such a question to the Federal Court. The remaining question is whether s. 31 of the Act is *ultra vires* art. 5 of the Federal Constitution. That question is not of such difficulty as to require reference to the Federal Court. In any case, it may be pursued in an appeal.

Article 5 of the Federal Constitution of Malaysia ('the constitution') is as follows:

> (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:

Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words 'without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)' the word 'within fourteen days':

And provided further that in the case of an arrest for an offence which is triable by a Syariah Court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah Court

(5) Clauses (3) and (4) do not apply to an enemy alien.

Article 5(1) of the constitution clearly provides a qualification 'save in accordance with law'. It has been held in *Comptroller General of Inland Revenue v. NP* [1973] 1 MLJ 165 that refers to 'enacted law' and not to general concepts of law such as natural justice. There being no suggestion that s. 31(1)(a) of the Act is not a law duly enacted by Parliament, there is little basis for reference under s. 84 of the Courts of Judicature Act 1964 as to whether or not s. 31(1)(a) is *ultra vires* art. 5. For the record, I do not find s. 31(1)(a) of the Act *ultra vires* art. 5 for the reason that art. 5 itself provides that the right under art. 5 could be curtailed by law.

Encik Azahar did not dispute that the constitutional rights of a person are not suspended by a sentence of imprisonment, except to such extent as necessitated by the imprisonment: *Francis Coralie Mullin* AIR [1981] SC 746; *DB Patrick* AIR [1974] SC 2092. That principle applies unquestionably to persons under remand.

Dato Mokhtar Hashim & Anor v. PP, in my view, cannot be read too generally. That case dealt with voluntariness of admissions and confessions, and the reference made to *Wong Kam Ming v. The Queen* [1980] AC 247 was in that respect. It is obvious that extraction of an admission or confession by oppressive or other means, where the question as to its voluntariness leads more

importantly is abhorrent. But since a voluntary statement is admissible, it cannot be that a person cannot be questioned, and the person may decide whether to assist or not by choosing to answer or not, or to volunteer self-incriminating statements or confession or not.

It is trite that constitutional provisions cannot be read in isolation, and that no fundamental right or guarantee is absolute. For example, the freedom of movement, to swing one's umbrella, ceases at the point of another person's nose where an action for assault would begin. Much profit would be gained by reading the Federal Court decision of Suffian LP in *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 at p. 200. In that case, he said:

> Syed Agil Barakbah J in *Ramli bin Salleh v. Inspector Yahya bin Hashim* [1973] 1 MLJ 54 considered *Moti Bai v. The State* AIR 1954 Raj 241 and a few other authorities and stated his conclusions as follows:
>
> > In the light of the authorities cited above, I am of the opinion that the right of an accused person remanded in police custody, to consult and be defended by a legal practitioner of his own choice as embodied in cl. (3) of art. 5 of the constitution, begins right from the day of his arrest even though police investigation has not yet been completed. On the other hand, the law also requires the police to carry out investigations in order to satisfy the constitutional requirement of cl. (1) of art. 5 with a view to bringing offenders to justice. It is in that respect and towards that end that the fundamental right of the accused to consult counsel of his own choice should be subject to certain legitimate restrictions which necessarily arise in the course of police investigation, the main object being to ensure a proper and speedy trial in the court of law. Such restrictions may relate to time and convenience of both the police and the person seeking the interview. They should not therefore be subject to any abuse by either party, for instance, by the police in unreasonably delaying the interview or by counsel in demanding an interview at any time that suits him or by interference with investigation.
>
> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

I have inserted the case references in the quote above for convenience. Although that case concerns right to counsel, the principle enunciated there as to the application of constitutional rights is good law today as it is then: it is a question of striking a balance between the constitutional rights of the applicant and the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. Each case must be decided on its own merits within the applicable constitutional principles.

To succeed upon the grounds that he has advanced, the applicant must discharge the onus that is upon him upon a balance of probabilities that his factual allegations with regard to his treatment in Bukit Aman since 17 August 1998 are true. I mention that date since that is the date his holding at Bukit Aman pursuant to the s. 31(1) (a) of the Act order commenced. The applicant in advancing his application chose to rely upon the affidavit of the applicant himself, without more. There is no suggestion that any of his core allegations can be corroborated by any person. On that basis, the applicant had applied for an early hearing under a certificate of urgency. The applicant had therefore asserted that he is ready to be heard. The date of hearing given was as required by and agreed to by the applicant.

There is nothing to show that the affidavits of either party is inherently untrue or unreliable. I therefore first accept the statements of the affidavits at their face value. Regrettably, where the applicant's affidavit asserts the material allegations, the respondents' affidavits deny those allegations, necessitating the court to look much more closely into the circumstances of this case.

To support the respondent's assertion that there are in fact investigations of a serious nature involving questions of national security, SAC Musa gave some details in support thereof. While it cannot be fairly and finally said whether the allegations are true or false since they are still being investigated, the fact that the police are conducting investigations cannot be said to be untrue. Indeed it is unnecessary in this case to consider or comment whether the allegations as against the third party and of the applicant's involvement are true or false. The respondents have merely asserted that investigations are proceeding and have given sufficient grounds to show there are reasonable grounds to continue to investigate.

As to the allegations of oppressive treatment of the applicant for the relevant period, that is, from 17 August 1998, these have been denied by ACP Ramasamy, who is one of the investigators questioning the applicant, and SAC Musa, who is in charge of the investigations. ACP Ramasamy, denying the various allegations of oppressive treatment by him, said also:

9 Saya menafikan semua dakwaan Nallakaruppan bahawa soal-siasat yang dijalankan oleh saya terhadapnya tidak berkaitan dengan keselamatan negara. Saya ingin menegaskan di sini bahawa soal-siasat yang dijalankan ada hubungkaitnya dengan keselamatan negara dan segala soal-siasat telah dijalankan mengikut peraturan-peraturan dan undang-undang negara.

SAC Musa, as the officer in charge of the investigation, had denied all allegations of oppressive conduct by his officers, and the police generally. In my considered opinion, it is unnecessary to require every officer to file a separate affidavit, just as it is as unnecessary to require the members of the police force to file separate affidavits to deny the allegation of malice, abuse of process and *mala fide*. As I have ruled earlier, no useful purpose could be served by doing so.

Allegations of malice, abuse of process and *mala fide* are serious allegations. It strikes at the root of the public's own manifestation of authority under the constitution, charged with the duty to protect the public, to maintain law and order. It is just as imprudent to lightly accept allegations of oppressive conduct by authority as it is to accept the testimony of an accomplice or victim of a sexual offence without corroboration, or proceeding without corroboration and without specifically warning oneself of the danger of doing so without corroboration. Indeed, s. 114(e) of the Evidence Act 1950 provides that the court may presume that judicial and official acts have been regularly performed.

Supposed abuse of power and oppressive conduct of authority is common grit of lore, no doubt fuelled by the bad apples that surface from time to time. But one does not condemn the orchard for the few bad apples, or all Malaysians for a few Malaysian bad apples. There is graver mischief in such superficial generalisation. For that reason, the court must decide only on the basis of the evidence before it.

Given the evidence placed before the court that there are allegations of a very serious nature against a third person such as to raise concerns of national security, that there are reasonable grounds to justify further and thorough investigations, and since the allegations suggest the involvement of the applicant, there are reasonable grounds for the conclusion that investigations must be continued, and that the applicant be questioned. It is reasonable to conclude then that the assertion by the applicant that he was never questioned on matters involving national security is doubtful, and the denials by SAC Musa and ACP Ramasamy, supported by the affidavit of the honourable Attorney General, are more likely to be true. On that basis, the application must fail.